83 - 1200

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC. ASSIGNEE OF BERG MILL SUPPLY CO., INC.; CONSOLIDATED FIBRES, INC., PAPER FIBERS, INC., and SASSOON INTERNATIONAL CORPORATION,

Petitioners,

v.

AMERICAN MAIL LINE, LTD., PACIFIC WESTBOUND CONFERENCE, JAPAN LINE, LTD., KOREA MARINE TRANSPORT CO., LTD., MITSUI O.S.K. LINES, LTD., SEA-LAND SERVICE, INC., SHOWA LINE., LTD., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

EDWARD L. MERRIGAN
6000 Connecticut Avenue, N.W.
Washington, D.C. 20815
(301) 656-0210
Counsel of Record for Petitioners

Of Counsel:

MARSHALL G. MINTZ
REAVIS & MCGRATH
700 South Flower Street
Los Angeles, California 90017

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

A. Re: Applicability Of The Antitrust Laws To Monopolistic Rate-Fixing Actions That Violate An Approved Agreement Under Section 15 Of The Shipping Act.[1]

1. Is the partial exemption from the antitrust laws granted by Section 15 of the Shipping Act to respondent Pacific Westbound Conference restricted to concerted rate-fixing actions that are within the bounds of the Conference's approved charter agreement under Section 15, as this Court ruled in *Carnation Co.* v. *Pacific Westbound Conference et al.*, 383 U.S. 213 (1966)—or is that exemption to be extended by the Ninth Circuit's decision in this case to monopolistic, discriminatory rate-fixing actions that are plainly prohibited by, and thus beyond the scope of, the Conference's approved charter?

B. Re: Applicability Of The Antitrust Laws To A Monopolistic Rate-Fixing Combination Of Carriers And Shippers That Relies On Secret Rate-Fixing Agreements Never Approved Under Section 15 Of The Shipping Act.

2.(a) Does Section 15 of the Shipping Act extend immunity from the antitrust laws to a monopolistic, discriminatory rate-fixing combination of carriers and shippers that constantly restrains wastepaper exports from the West Coast to the Far East by utilizing, as its most effective anticompetitive weapon, secret, preferential rate-fixing agreements, none of which are

---

[1] Section 15 of the Shipping Act, 46 U.S.C. § 814.

The questions presented for review arise out of the following circumstances: After a lengthy investigation under the Shipping Act, a Federal Maritime Commission Administrative Law Judge (ALJ) ruled that respondents' monopolistic, discriminatory rate-fixing practices in this case (1) violate Article 2 of the Conference's approved charter under § 15 of the Shipping Act; (2) violate rate-fixing prohibitions contained in the Shipping Act itself; and (3) are detrimental to U.S. commerce and contrary to the public interest (App. 40a-41a). The ALJ thus found that respondents "misused" the Conference's approved charter agreement, and "operated beyond the

subject to regulation under the Shipping Act, and thus have never been filed or approved under Section 15?

(b) Should this Court decide this important federal question because the Ninth Circuit's vague ruling on this issue conflicts with this Court's decisions in *Carnation, supra; Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 728 (1973) ("[I]f . . . contracts are not approved by the Commission, the antitrust laws are fully applicable to them"); and *Group Life & Health Ins.* v. *Royal Drug Co.*, 440 U.S. 205, 231 (1979) ("an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties")?

(c) Further, should this Court decide this question because the Ninth Circuit's ruling on this issue also clashes with the District of Columbia Circuit's decision in *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804, 818 (D.C. Cir. 1968), *cert. denied* 393 U.S. 1093 (1969) ("[T]he antitrust laws continue in effect . . . as to areas not subject to the Shipping Act—e.g. a restraint engineered by one or more ocean tramps affecting American foreign commerce")?

---

scope of the Commission's grant of partial immunity from the antitrust laws" (App. 40a-41a).

Upon review of the Commission's subsequent arbitrary rejection of the ALJ's rulings, the District of Columbia Circuit reversed the Commission and substantially affirmed the ALJ's findings. *National Assn. of Recycling Industries, Inc.* v. *Federal Maritime Commission*, 658 F.2d 816, 823, 829 (1980).

The Ninth Circuit has now summarily dismissed petitioners' ensuing antitrust action against the Conference and its members, holding that the antitrust immunity they enjoy under Section 15 of the Shipping Act is so broad and so enduring that it even encompasses monopolistic, discriminatory rate-fixing that has been found to be flatly prohibited by *both* the Shipping Act itself and the Conference's approved charter under Section 15 (App., 1a-8a).

C. Re: Applicability Of The Antitrust Laws To Monopolistic Rate-Fixing Found, After Investigation Under The Shipping Act And Judicial Review, To Violate Rate-Fixing Prohibitions Contained In The Shipping Act, To Be Detrimental To U.S. Commerce And Contrary To The Public Interest.

3.(a) Did the Ninth Circuit err by ruling that respondents' monopolistic, discriminatory rate-fixing actions in this case—which were found to be violative of rate-fixing prohibitions contained in Section 18(b)(5) of the Shipping Act[2], detrimental to U.S. commerce and contrary to the public interest in *National Association of Recycling Industries, Inc.* v. *Federal Maritime Commission et al.*, 658 F.2d 816 (1980)—are nevertheless still exempt from the antitrust laws under Section 15 of the Shipping Act?

Stated differently: Do even exempt monopolists become subject to antitrust restraints when they extend or exploit their lawful monopoly in an illegal manner prohibited by the very federal statute upon which their exemption is based?

(b) Should this Court resolve this important federal question because the Ninth Circuit's decision concedes on its face that it is in irreconcilable conflict with the decision from the Second Circuit in *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 285 F.Supp. 949 (S.D.N.Y. 1968), *cert. denied* 407 F2d 173 (2d Cir. 1969), *cert. denied* 394 U.S. 922 (1969)—and that its decision is also at odds with the District of Columbia Circuit's recent decision in *United States* v. *Bessemer & Lake Erie Railroad Company*, 717 F.2d 593, 599-600 (1983)?[3]

---

[2] Shipping Act of 1916, as amended, 46 U.S.C. 817(b)(5).

[3] And, in addition, because the Ninth Circuit's decision is also in conflict with the decision in *Ocean Shipping Antitrust Litigation*, 500 F.Supp. 1235 (S.D.N.Y. 1980).

D. Re: Applicability Of The Antitrust Laws To Monopolistic Discriminatory Rates Privately Fixed Without Participation, Supervision Or Advance Approval Of Any Government Agency.

4.(a) Do the antitrust laws apply to illegal, monopolistic, discriminatory ocean freight rates, *privately fixed* by the Pacific Westbound Conference and its members and imposed on shippers, without any participation, supervision or advance approval of the Federal Maritime Commission or any other government agency?

(b) Should this question be settled by this Court since the Ninth Circuit's decision on this issue conflicts with this Court's decisions in *State of Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 458-460 (1945), *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372-375 (1973), *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 592-600 (1976), *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980) and *Nat. Gerimedical Hospital & Gerontology* v. *Blue Cross*, 452 U.S. 378 (1981)?

E. Re: Availability Of Antitrust Relief Where Relief Is Allegedly Also Available Under The Shipping Act.

5. Did the Ninth Circuit also err by suggesting—contrary to this Court's decisions in *Carnation Co.* v. *Pacific Westbound Conference*, *supra* at 383 U.S. 224, and *State of Georgia* v. *Pennsylvania R. Co.*, *supra*, at 324 U.S. 459, 460—that petitioners are foreclosed from relief under the antitrust laws because allegedly "private remedies do exist under the Shipping Act"?

F. Re: Applicability Of The *Per Se* Antitrust Liability Doctrine To This Case Absent Immunity From The Antitrust Laws.

6. If the concerted, monopolistic rate-fixing activities of the Pacific Westbound Conference and its members in this case are not cloaked with antitrust immunity under the Shipping Act, are they *per se* unlawful under the Sherman Act and this

Court's decisions in *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 341-42 (1897), *United States* v. *Joint Traffic Association*, 171 U.S. 505 (1898), *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940), *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947), *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958), *Catalano* v. *Target Sales, Inc.*, 446 U.S. 643, 647 (1980), and *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982)?

G. Re: The Ninth Circuit's Summary Dismissal Of The Complaint.

7.(a) Did the Ninth Circuit err, as it did in Carnation (383 U.S. 222) and contrary to *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957), by summarily dismissing the complaint for failure to state a claim without affording petitioners an opportunity to prove or further develop the facts alleged in the complaint?

(b) Did the Ninth Circuit err by failing even to discuss the facts alleged in the complaint and by apparently failing to "look at the economic reality of the relevant transactions," as this Court directed in *United States* v. *Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 208, 209?

(c) Did the Ninth Circuit, contrary to this Court's decision in *Continental Ore Co.* v. *Union Carbide & Carbon Co.*, 370 U.S. 690, 698-99 (1962), err by adjudging the combination in restraint of trade alleged in the complaint on a piecemeal basis, and not as a continuing, undivided rate-fixing combination of carriers and shippers?

LIST OF PARTIES

The following parties were before the United States Court of Appeals for the Ninth Circuit in this case:

Petitioners

1. National Association of Recycling Industries, Inc., New York, N.Y., the trade association for the nation's metals, paper, textile and rubber recycling industries.

2. Berg Mill Supply Co., Inc., Beverly Hills, California.

3. Consolidated Fibres, Inc., San Francisco, California.

4. Paper Fibers, Inc., Los Angeles, California.

5. Sassoon International Corporation, formerly M. Sassoon & Co., Inc., Los Angeles and Oakland, California.

6. A class consisting of firms similarly situated to Berg Mill Supply Co., Inc., Consolidated Fibres, Inc., Paper Fibers, Inc. and Sassoon International Corporation which, during the period of time covered by the complaint, exported or shipped recyclable or recycled wastepaper by water in foreign commerce from the West Coast of the United States and Canada to customers or markets in the Far East aboard vessels operated by respondent carriers at rates fixed by respondent carriers in combination through appellee Pacific Westbound Conference.

Respondents

7. Pacific Westbound Conference, San Francisco, California.

8. American Mail Line, Ltd., Seattle, Washington.

9. American President Lines, Inc., Oakland, California.

10. Barber Blue Sea Line, a/k/a Barber Lines, A/S. Oslo, Norway.

11. The East Asiatic Co., Ltd., a/k/a "EAC-Knutsen Line", Copenhagen, Denmark.

12. Galleon Shipping Corporation, Manila, Philippines.

13. Global Bulk Transport, Incorporated, Isthmian Lines, Inc. and States Marine International Corp., a/k/a "States Marine Lines", New York, New York.

14. Japan Line, Ltd., Tokyo, Japan.

15. Kawasaki Kisen Kaisha, Ltd., Kobe, Japan.

16. Korea Marine Transport Co., Ltd., Seoul, Korea.

17. A.P. Moller-Maersk Line, a consortium consisting of Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svenborg, Copenhagen, Denmark.

18. Maritime Company of the Philippines, Manila, Philippines.

19. Mitsui O.S.K. Lines, Ltd., Tokyo, Japan.

20. Nippon Yusen Kaisha, Tokyo, Japan.

21. Orient Overseas Container Line, Inc., a/k/a "OOCL-Seapac Service", Hong Kong.

22. Pacific Far East Line, Inc., San Francisco, California.

23. Peninsular and Steam Navigation Company, London, England.

24. Phoenix Container Lines, Ltd., Hong Kong.

25. The Scindia Steam Navigation Co., Ltd., Bombay, India.

26. Sea-Land Service, Inc., Edison, New Jersey.

27. Seatrain Lines, Inc. and Seatrain International, S.A., New York, New York and Oakland, California.

28. Shipping Corporation of India, Ltd., Bombay, India.

29. Showa Line, Ltd., formerly Showa Shipping Co., Inc., Tokyo, Japan.

30. States Steamship Company, a/k/a "States Line", San Francisco, California.

31. Transportation Maritima Mexicana, S.A., Mexico.

32. United Philippine Line, Manila, Philippines.

33. United States Lines, Inc., New York, New York.

34. Yamashita-Shinnihon Steamship Co., Inc., a/k/a "Y.S. Line", Tokyo, Japan.

35. Waterman Steamship Corporation, New York, New York.

36. Zim Israel Navigation Co., Ltd., a/k/a "Zim Container Service", Haifa, Israel.

TABLE OF CONTENTS

Table of Contents Continued

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC. ASSIGNEE OF BERG MILL SUPPLY CO., INC.; CONSOLIDATED FIBRES, INC., PAPER FIBERS, INC., and SASSOON INTERNATIONAL CORPORATION,

Petitioners,

v.

AMERICAN MAIL LINE, LTD., PACIFIC WESTBOUND CONFERENCE, JAPAN LINE, LTD., KOREA MARINE TRANSPORT CO., LTD., MITSUI O.S.K. LINES, LTD., SEA-LAND SERVICE, INC., SHOWA LINE., LTD., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this case is printed in the Appendix hereto, at pages 1a-8a. The earlier decision of the United States District Court for the Central District of California is printed in the Appendix, at pages 9a-21a. The decision of the United States Court of Appeals for the District of Columbia Circuit in the closely related case under the Shipping Act, *National Association of Recycling Industries, Inc. et al.* v. *Federal Maritime Commission et al.*, is officially reported at 658 F.2d 816 (1980).

JURISDICTION

The judgment of the Ninth Circuit in this case was entered on November 14, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved in this case are Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2; Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15; and Sections 15 and 18(b)(5) of the Shipping Act of 1916, as amended, 46 U.S.C. §§ 814, 817(b)(5). The relevant portions of those statutes are printed in the Appendix hereto, at pages 76a through 80a.

STATEMENT OF THE CASE

A. Introduction

This case under the Sherman and Clayton Antitrust Acts presents issues of critical importance to the nation's maritime and recycling industries, and to American exporters whose ability to export is necessarily dependent on monopolistic ocean rate-fixing conferences controlled by foreign shipping cartels.

The Ninth Circuit's *unprecedented* decision in this case clashes head-on with this Court's decision in *Carnation Co.* v. *Pacific Westbound Conference et al.*, 383 U.S. 213 (1966), and with many other landmark antitrust decisions rendered by this Court and other courts in the federal system. The Ninth Circuit's rulings extend broad, practically unlimited antitrust immunity under Section 15 of the Shipping Act, 46 U.S.C. § 814, to monopolistic, discriminatory rate-fixing activities of the Pacific Westbound Conference and its members which, after lengthy investigation and judicial review under the Shipping Act in *National Association of Recycling Industries, Inc.* v. *Federal Maritime Commission et al.*, 658 F.2d 816 (1980), were found to—

(1) violate basic rate-fixing prohibitions contained in the Conference's own approved rate-fixing charter under Section

15 of the Shipping Act—a charter whose provisions, as approved by the Federal Maritime Commission under the statute, define and limit the scope of the *partial* antitrust exemption enjoyed by the Conference and its members under the Shipping Act;

(2) violate statutory rate-fixing prohibitions contained in the Shipping Act itself—prohibitions enacted by Congress to restrict the partial antitrust exemption granted to any carrier or conference of carriers under Section 15 of the Act; and

(3) thrive on a series of secret, discriminatory, preferential rate-fixing agreements made by the "Big Six" Japanese carrier members of the Pacific Westbound Conference with some of petitioners' most powerful competitors—the Japanese cartels that export vast quantities of competing virgin wood chips from the Pacific Coast to the Far East—none of which agreements were ever filed or approved under Section 15 of the Shipping Act, and which thus are not entitled to any antitrust immunity under Section 15.

In reality, therefore, the Ninth Circuit's decision threatens to return this nation's shippers and exporters to the dark days *prior* to *Carnation*, *supra*, when courts in the Ninth Circuit erroneously approved the Pacific Westbound Conference's original straightforward claim that "the Shipping Act, 1916 repealed all antitrust regulation of the rate-making activities of the shipping industry" (383 U.S. 216).

B. The Basic Facts

Petitioners and the class of U.S. shippers and exporters they represent in this action are relatively small Pacific Coast firms engaged in the business of shipping recyclable wastepaper, collected and processed in the United States, from ports along the West Coast to paper manufacturers in Japan, Korea, Taiwan and other countries of the Far East (App. 24a, 25a).[1]

---

[1] References to "App" are to the Appendix to this petition. References to "CR" are to the record in the courts below.

These U.S. wastepaper shippers necessarily compete in the Far East with both (i) wastepaper shippers from other nations and (ii) large U.S. forest products companies and Japanese cartels that ship virgin wood chips and/or processed virgin woodpulp from the Pacific Coast to paper manufacturers in the Far East (App. 32a-33a). It has been *judicially* established, of course, that "wastepaper competes with woodpulp and wood chips" in the Far East, and that these commodities are the basic raw materials required for paper manufacturing both here in the United States and in the Orient.[2]

The complaint alleges the obvious: A cheap, abundant supply of recyclable wastepaper is constantly available in the United States for shipment to the Far East—and several important public interests dictate that it be recycled and reused, not burned or buried as solid waste (App. 33a).[3] In the Far East, in turn, there is a huge, growing demand for paper manufacturing raw materials, all three of which are interchangeable for paper manufacturing purposes (App. 32a).[4] Since wastepaper prices on the Pacific Coast are low, that wastepaper is very attractive to buyers in the Far East. In the final analysis, therefore, the *cost of ocean transportation* determines whether wastepaper is saleable, and in what volumes (App. 33a).[5]

---

[2] See *National Association of Recycling Industries, Inc.* v. *Federal Maritime Commission*, 658 F.2d 816, 818, 820-22, 827-28 (D.C. Cir. 1980).

[3] See *National Association of Recycling Industries, Inc.* v. *Interstate Commerce Commission*, 585 F.2d 522, 531, n.45, 46 (1978), *cert. denied*, 440 U.S. 929 (1979); *Nat. Assn. of Recycl. Ind.* v. *F.M.C.*, *supra*, at 658 F.2d 827-829 (1980). See also *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 99 S.Ct. 2531 (1978), including the factual discussion in the dissenting opinion.

[4] *See* 658 F.2d 819-822.

[5] *Id.*, at 658 F.2d 822-823.

The record in this case demonstrates that the *cost of ocean transportation* for competing shipments of recyclable wastepaper, virgin woodpulp and virgin wood chips in the Pacific westbound trade has consistently been fixed by the carrier members of the Pacific Westbound Conference by means of (i) rate-fixing actions taken in concert or combination by the carriers through the Conference, and (ii) rate-fixing actions taken by carrier members of the Conference in concert or combination with petitioners' principal competitors, large shippers of competing virgin woodpulp and/or wood chips in the Pacific westbound trade (App. 33a-36a).[6]

In this regard, it is established in this case that the Pacific Westbound Conference is a "monopolistic rate-making association."[7] It is controlled 4 to 1 by foreign flag shipping cartels, and its membership consists of such international ocean transportation giants as the "Bix Six" Japanese carriers (Japan Line, Mitsui, Showa et al); European shipping consortiums such as Barber Blue Sea Line and The East Asiatic Company; the large Hong Kong containership companies; the largest U.S. flag operators (Sea-Land, United States Lines etc.); the Israeli shipping company, Zim Israel; and others from Korea, India and the Philippines (App. 26a-30a). During the period covered by the complaint, the Pacific Westbound Conference and its members enjoyed almost total, absolute monopoly control over wastepaper shipments from the West Coast to the Far East.[8] On the average, Conference members carried almost 95% of the wastepaper exports;[9] in some years, they actually monopolized 99% of the available wastepaper traffic to the Far East (App. 59a).[10] This monopoly is nurtured by the Conference's "*dual rate system*," which compels wastepaper shippers who

---

[6] *Id.*, at 658 F.2d 819-824.

[7] *Id.*, at 658 F.2d 818.

[8] *Id.*, at 658 F.2d 823.

[9] *Id.*

[10] *Id.*

refuse to agree to ship *exclusively* aboard Conference vessels to pay penalties that add 15% to the Conference's wastepaper rates that are already extraordinarily unreasonable and extremely discriminatory (App. 59a).[11]

The Conference and its members, however, have not achieved that same degree of monopolistic control over the wastepaper shippers' principal competitors—the large integrated forest products companies (Weyerhaeuser, Georgia-Pacific, Crown-Zellerbach etc.) that ship competing virgin woodpulp and/or wood chips, and the Japanese cartel trading companies that purchase and ship wood chips from the Pacific Coast to Japan and Korea each year (App. 57-59a).[12] Woodpulp movements are subject to some competition from non-Conference carriers, while rates for wood chip shipments are fixed by members of the Pacific Westbound Conference in combination, and through secret rate-fixing agreements, with the wood chip shippers, principally the Japanese cartels.[13]

Over the years since the late 1960's, therefore, the Conference and its members have actually utilized their monopolistic domination of U.S. wastepaper shippers to make them help *subsidize*, through the payment of "*outrageously high*" rates, the *extremely low, preferential* rates the Conference and its members continuously grant competing woodpulp and wood chip shippers for ocean transportation to the same markets in the Far East.[14] This debilitating restraint of trade in recyclable wastepaper has been accomplished by respondents in the following manner:

1. Their wastepaper rates are rigidly fixed and enforced at extraordinarily high levels through combined, concerted rate-

---

[11] *Id.*

[12] See *Id.*, at 658 F.2d 820. See also *Confidential Ex. 99* on file with the Clerk of this Court.

[13] *Id.*, at 658 F.2d 820; *Confidential Ex. 99.*

[14] *Id.*, at 658 F.2d 822-823.

fixing actions of the Pacific Westbound Conference (App. 34a).[15] Each and every carrier member of the Conference is contractually obliged to charge those fixed rates, albeit the rates have periodically exceeded the Pacific Coast F.O.B. value of the wastepaper by as much as *268%* to *309%* (App. 55a, 69a-70a). Since Conference members have enjoyed almost total monopoly control over all wastepaper shipments, wastepaper shippers either paid the exorbitant rates or forfeited their markets in the Far East.

The Conference has also discouraged non-Conference carrier competition for wastepaper shipments to the Far East by fixing, whenever necessary, extremely discriminatory rates among competing wastepaper shippers (App. 37a). For example, to discourage non-Conference competition for shipments to Taiwan, the Conference recently fixed a containerized wastepaper rate of $39.00 per ton, while its fixed rate for identical containerized wastepaper shipments to Japan was $65.00 a ton, albeit trips to Taiwan are 1,500 miles longer—and thus more costly for carriers—than trips to Japan (App. 68a).

2. Respondents' woodpulp rates, on the other hand, have been kept "*open*" by the Conference—i.e. fixed, not by concerted action of the Conference members, but by individual carrier members of the Conference in *combination with the woodpulp shippers*, at whatever levels that traffic would agree to pay to ship aboard Conference members' vessels.[16] Those rates were therefore regularly about *100% lower* than the Conference's fixed wastepaper rates—and unlike those oppressive rates, they amounted to only *16%* to *29%* of the woodpulp exports' Pacific Coast F.O.B. valuations (App. 55a).[17]

---

[15] *Id.*, at 658 F.2d 818.

[16] *Id.*, at 658 F.2d 818.

[17] *Id.*, at 658 F.2d 818, 822.

The Commission investigation disclosed that *no* relevant transportation characteristics—such as volume of shipments, dependability of traffic, commodity valuations etc.—justified these "outrageous" rate differentials for *identical containerized cargoes* of competing wastepaper and woodpulp to the same markets in the Far East. Indeed, the transportation characteristics of wastepaper are more favorable for the carriers, and thus wastepaper, not woodpulp, actually merits a lower rate (CR 30, p. 68-84; 104).[18]

3. Finally, wood chip rates are fixed by respondent "Big Six" Japanese carrier members of the Conference in *combination with the wastepaper shippers' other competitors, the wood chip shippers*. The Japanese carriers operate *outside the Conference* to make secret, long-term rate-fixing agreements with these shippers--typically Japanese cartels closely related by corporate affiliation to Japanese carrier members of the Pacific Westbound Conference (App. 36a, 58a; Confidential Exhibit 99).[19] None of these secret rate-fixing agreements are subject to regulation under the Shipping Act, hence none are filed or approved under Section 15.[20]

Evidence produced by one of the Japanese carriers, respondent Japan Line, established that these secret, unapproved rate-fixing agreements provided petitioners' competitors—the Japanese cartel wood chip shippers—with rates for 10 years that are as much as *400% lower* than the monopolistic rates fixed in concert by the Japanese carriers and other members of the Conference for competing wastepaper shipments to the same markets in Japan and Korea.[21] This type of predatory rate-fixing behavior was not isolated or inadvertent: "All of

---

[18] *Id.*, at 658 F.2d 822.

[19] See *Confidential Exhibit 99, supra*.

[20] See 658 F.2d 820.

[21] For example, compare the wastepaper rates contained in the Maritime Commission's chart at App. 55a with *Confidential Ex. 99* on file with the Court.

PWC's Japanese member lines" made "private non-Conference contractual arrangements" with petitioners' competitors, the wood chip shippers, while they simultaneously participated as Conference members in the constant imposition of monopolistic, discriminatory rates on competing wastepaper shipments. (App. 58a).[22]

The economic consequences suffered by U.S. wastepaper shippers have been devastating. They have consistently been forced to pay *four times* as much as competing wood chip shippers, and more than *twice* as much as competing woodpulp shippers, to transport *identical tonnages* of the competing materials to the *same markets* in the Far East (App. 55a; *Confidential Ex. 99*). The Far East market for wood chips, which was not even established until 1965, grew so steadily and spectacularly that soon more than 4,000,000 tons a year were shipped from the Pacific Coast to Japan and Korea alone (App. 58a). U.S. wastepaper exporters, on the other hand, realized "proportionately little of the market's potential."[23] "Whereas the Far East demand for recyclables is vast, only *two percent* of Japan's wastepaper requirements are filled by exports from the United States."[24]

Consequently, it has been established in this case that respondents' monpolistic, discriminatory, preferential rate-fixing practices have constantly restrained trade in recyclable wastepaper, and resulted in the loss of markets, sales and profits for petitioners and the American wastepaper shippers they represent herein (App. 60a-64a).

---

[22] Compare *Confidential Ex. 99, supra*, with list of Conference member respondents in this case, and see App. 58a.

[23] See 658 F.2d 823.

[24] *Id.*

C. The Related Case Under The Shipping Act

On July 20, 1972, the Federal Maritime Commission issued an order of investigation under the Shipping Act which charged that respondents' aforesaid rate-fixing activities violate Sections 15, 16 First, 17 and 18(b)(5) of the Act (App. 53a, 54a). The Commission asserted that respondents' actions were contrary to the public interest, detrimental to U.S. commerce, unreasonable and unjustly discriminatory as between competing shippers (App. 53a, 54a).[25]

Hearings before an Administrative Law Judge (ALJ) dragged on for years. Finally, on August 15, 1977—more than five years later—the ALJ rendered a decision in which he ruled that the Conference's wastepaper rates were "exorbitant," "outrageously high," and violative of Sections 15 and 18(b)(5) of the Shipping Act (App. 63a-65a). With direct pertinence to the issues now before this Court, the ALJ ruled (CR 30, p. 127; 658 F.2d 823):

> "First, in fixing wastepaper rates so unreasonably high as to be a detriment to commerce, PWC misused its conference agreement to contravene the regulatory purpose of Section 18(b)(5). In employing its agreement so injuriously, PWC operated beyond the scope of the Commission's grant of partial immunity from the antitrust laws. The abusive use of the agreement operated to the detriment of the commerce of the United States and contrary to the public interest. . . .
>
> "Second, PWC's rate making practices were unjustly unfair as between wastepaper and woodpulp shippers . . . in violation of an express provision of Section 15 and in disregard of the specific terms of Article 2 of [PWC] Agreement No. 57. These illegalities also operated to the detriment of the commerce of the United States and contrary to the public interest. . . ."

On March 9, 1979, another eighteen months later, the Federal Maritime Commission—an agency criticized by the courts

---

[25] FMC Docket No. 72-35, Pacific Westbound Conference—Wastepaper and Woodpulp From United States to Far East.

and Congress for its maladministration of the Shipping Act in cases involving monopolistic, anticompetitive activities[26]—arbitrarily reversed the ALJ on all grounds and rejected an Environmental Impact Statement prepared by its own Office of Environmental Analysis (CR 30, p. 132 et seq).

On December 24, 1980, almost another two years later, the D.C. Circuit vacated the Commission's decision, reinstated the Environmental Impact Statement, substantially affirmed the ALJ's rulings, and found respondents' rate-fixing actions violative of Section 18(b)(5) of the Shipping Act, 46 U.S.C. § 817(b)(5), detrimental to U.S. commerce, and contrary to the public interest.[27] The D.C. Circuit described the Federal Maritime Commission's performance in this case as follows, at 658 F.2d 818:

> "The Commission's laxity challenges the very character of the [Shipping] Act which, on one hand, grants considerable license to carriers, and on the other, obligates the Commission to ensure that the license does not work to the disadvantage of the national commerce."

The D.C. Circuit thus warned that, while the court would not attempt to "define the boundaries of the antitrust liability of carriers" under the Shipping Act in that case, the entire

---

[26] See *United States Lines, Inc.* v. *Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978); *Sabre Shipping Corp.* v. *American President Lines et al.*, 285 F.Supp. 949, 955-958 (S.D.N.Y. 1968), *cert. denied sub nom. Japan Line, Ltd.* v. *Sabre Shipping Corp;* 407 F.2d 173 (2d Cir. 1969), *cert. denied*, 395 U.S. 922 (1969); *Interpool, Ltd.* v. *Federal Maritime Commission*, 663 F.2d 142, 148-151 (D.C. Cir. 1980). In a 1982 House Judiciary Committee report on "*International Ocean Commerce Transportation*", H. Rept. 97-611, Part 2, pgs. 19, 43, 46, the Commission is variously described as "an inept regulatory agency", as "traditionally wedded to the cartels it regulates", and as a Commission which has "regulated with varying degrees of alacrity".

[27] *National Association of Recycling Ind.* v. *F.M.C.*, at 658 F.2d 825, 829.

"*rationale*" for antitrust immunity under Section 15 would surely "*cease*" if the Commission continues to fail to provide effective regulatory control over respondents' illegal, monopolistic, discriminatory rate-fixing actions.[2]

The Commission, however, completely ignored the D.C. Circuit's rulings. For more than a year after the court's decision was rendered, the Commission took no regulatory action of any kind. On January 11, 1982, the Commission finally issued a notice stating that, in its opinion, "no further administrative proceedings are necessary in this case" (App. 47a; CR 24, p. 108). Subsequently, the Commission asserted simply that it had no authority, in response to the D.C. Circuit's decision, to compel respondents to pay reparations for any of their past rate-fixing violations of Section 18(b)(5) of the Act, or to establish any new, lawful rates for wastepaper shippers (CR 34, p. 5).

D. Proceedings in The Ninth Circuit

In 1982, petitioners—still confronted with essentially the same monopolistic, discriminatory rate-fixing restraints of trade after a decade of proceedings under the Shipping Act, and with no effective relief in sight under that statute (App. 41a)—filed their complaint under the Sherman and Clayton Antitrust Acts (App. 23a-51a). The complaint was summarily dismissed by *unprecedented* decisions in the Ninth Circuit which held that, merely because the Pacific Westbound Conference holds an approved charter under Section 15 of the Shipping Act, all of respondents' monopolistic, discriminatory rate-fixing actions in this case are exempt from the antitrust laws, albeit said actions (1) violate rate-fixing prohibitions contained in the Conference's approved charter itself; (2) violate rate-fixing prohibitions contained in the Shipping Act; and (3) rely, in major part, on secret, unapproved rate-fixing agreements between Conference members and petitioners'

---

[2] See *Nat. Assn. of Recycling Ind.* v. *F.M.C.*, at 658 F.2d 826.

competitors, non-exempt shippers, that are plainly not eligible for antitrust immunity under Section 15 (App. 1a-21a).

REASONS FOR GRANTING THE WRIT

I

The Ninth Circuit's Decision Irreconcilably Conflicts With This Court's Decision In *Carnation Co.* v. *Pacific Westbound Conference* And The Fifth Circuit's Related Decision In *Pacific Westbound Conference* v. *Federal Maritime Commission* In That It Grants Antitrust Immunity To Unapproved, Monopolistic, Discriminatory Rate-Fixing Activities Of The Conference That Violate—And Thus Operate Beyond The Scope Of—The Conference's Approved Charter Under Section 15 Of The Shipping Act

The Ninth Circuit's decision in this case is manifestly erroneous, and it clashes head-on with the combined decisions of this Court and the Fifth Circuit in *Carnation Co.* v. *Pacific Westbound Conference et al*, 383 U.S. 213, 86 S.Ct. 781 (1966), and *Pacific Westbound Conference* v. *Federal Maritime Commission*, 440 F.2d 1303, 1309-10 (1971), *cert. denied* 404 U.S. 881, 92 S.Ct. 202 (1971).

As indicated above, the Ninth Circuit's decision grants a sweeping exemption from the antitrust laws to respondents' concerted, grossly discriminatory rate-fixing activities and restraints of trade in this case *solely* because respondent Pacific Westbound Conference holds a *facially-benign* organizational charter that was approved six decades ago under Section 15 of the Shipping Act, 46 U.S.C. § 814.[29] But, the record in this case establishes—and the Ninth Circuit's decision necessarily

---

[29] § 15 of the Shipping Act extends antitrust immunity exclusively to "agreements, understandings, conferences, and other arrangements" that are "lawful under this section"—i.e. that are approved in advance by the Commission. *Unapproved* rate-fixing arrangements are "*unlawful*", and *non-exempt*. Section 15 prohibits the Commission from approving—or continuing its prior approval—of rate-fixing understandings or conference rate-fixing activities found to be un-

concedes—that the *unfair, unreasonable, discriminatory* rate-fixing actions the Pacific Westbound Conference and its members have wilfully and continuously imposed in concert on petitioners in recent years *plainly violate essential rate-fixing prohibitions which have always been at the forefront of the Conference's said approved charter under Section 15* (App. 6a, 7a). Clearly, that type of *destructive, anticompetitive* rate-fixing was neither *contemplated* nor *licensed* when the Maritime Commission's predecessor agency approved the Conference's charter under Section 15 in 1923. *Ergo*, said charter, as approved under the Shipping Act, cannot, and does not, legally immunize that type of *discriminatory, anticompetitive* rate-fixing from the antitrust laws.

More specifically, the record demonstrates that when the giant international ocean carrier organizers of the Pacific Westbound Conference presented their charter to the Commission's predecessor agency in 1923 for approval under Section 15 of the Shipping Act—and thus asked for permission to engage in concerted, monopolistic rate-fixing activities—they assured the Government that their *sole* purpose was "to promote commerce . . . for the common good of shippers and carriers" (App. 69a). Consequently, in order to gain federal approval of their charter, respondents solemnly committed themselves as follows, at Article 2 (App. 70a): "There shall be no undue preference nor unreasonable discrimination nor unfair practice against any consignor or consignee by any of the parties hereto."

In *Carnation Co.* v. *Pacific Westbound Conference*, *supra*, the Conference contended that Section 15 of the Shipping Act—under which its charter was approved—"repealed all

---

justly discriminatory or unfair as between shippers, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of any section of the Shipping Act (See 46 U.S.C. § 814).

antitrust regulation of [its] ratemaking activities" (383 U.S. 216). The Ninth Circuit, as it has done here, approved that contention, but this Court reversed, holding that the Conference and its members have only *"a limited antitrust exemption"* (383 U.S. 219). This Court ruled, at 383 U.S. 216, 217:

> "The Shipping Act contains an explicit provision exempting activities which are lawful under § 15 of the Act from the Sherman and Clayton Acts. This express provision covers approved agreements, which are lawful under § 15, but does *not* apply to the implementation of unapproved agreements, which is specifically prohibited by § 15. The creation of an antitrust exemption for ratemaking activities which are lawful under the Shipping Act implies that unlawful rate-making activities are *not* exempt."

After this Court's decision in *Carnation*, the litigation in that case moved to the Fifth Circuit in *Pacific Westbound Conference* v. *Federal Maritime Commission*, *supra*. There, it was ruled that the Pacific Westbound Conference's approved charter under Section 15, which is essentially the same charter now involved in this case, exempts only *routine ratemaking* activities from the antitrust laws; *rate-fixing activities "not contemplated by the plain language" of said charter are non-exempt, unless and until they are specifically and separately approved by the Commission under Section 15* (See 440 F.2d 1303, 1309).[20] The Fifth Circuit emphasized that rate-fixing arrangements which *"unlawfully affect"* the Conference's organic charter, or which are *not "incidental"* to the charter as

---

[20] § 15 of the Shipping Act defines the term *"agreement"* to include *"understandings, conferences,* and *other arrangements"*. Under the Pacific Westbound Conference's charter, all rate-fixing actions are taken by secret "agreement" of two-thirds of the Conference's membership (App. 71a; 73a-74a). Thus, rate-fixing actions are "agreements", either within or outside the scope of the Conference's charter. Those that *violate* the Conference's approved charter are patently *unapproved, non-exempt agreements* under § 15 (See *Pacific Westbound Conference* v. *Federal Maritime Commission*, 440 F.2d 1309, 1310).

approved, are unlawful under Section 15—and thus not exempt from the antitrust laws (See 440 F.2d 1309, 1310). This Court subsequently denied certiorari in the Fifth Circuit case (404 U.S. 881), whereupon the Pacific Westbound Conference and its members settled Carnation's antitrust claim which was still pending.

Similarly, in *American Export & Isbrandtsen Lines* v. *Federal Maritime Commission*, 334 F.2d 185, 198 (9th Cir., 1964), when the Pacific Coast European Conference adopted a practice which allowed its members to *discriminate* among shippers by absorbing certain shippers' port equalization expenses, that practice was declared "*unlawful*" and "*unapproved*" under Section 15 of the Shipping Act, since it was *not* "*within the scope of [the] approved Conference Agreement.*" The Ninth Circuit ruled that "Such agreement contains no provision expressly authorizing port equalization, nor do we find any implicit authority contained therein" (334 F.2d 198).

When *Carnation*, *Pacific Westbound Conference* and *American Export Lines*, *supra*, are correctly applied in the case at bar, it immediately becomes apparent that the Pacific Westbound Conference's approved charter under Section 15 does no more than grant respondents the strictly limited privilege of acting in concert to fix and enforce rates that do *not unreasonably or unfairly discriminate among competing shippers* (App. 70a). Thus, while the Conference's approved charter immunizes *non-discriminatory rate-fixing* from the antitrust laws under Section 15, it concomitantly *does not immunize unfair, unreasonable, discriminatory, anticompetitive rate-fixing* (App. 70a). That type of rate-fixing, which destroys competition and restrains trade, was obviously not even contemplated by either the Conference or the Commission's predecessor when the latter approved the Conference's charter in 1923. That type of destructive rate-fixing is "not within the scope of the approved Conference agreement"; it is, in fact, prohibited by that approved agreement; and therefore it is not entitled to any exemption from the antitrust laws under Section 15 of the Shipping Act in this case.

In this regard, the D.C. Circuit recently ruled in *Interpool Ltd.* v. *Federal Maritime Commission*, at 663 F.2d 142, 149 (1980):

> "Although these conferences have been authorized to set rates and charges, the courts and the Commission have consistently held that such general authorizations do not permit conferences to act in a manner that will affect competition in a manner unforeseen when the conference agreements were approved."

Thus, the Ninth Circuit erred by summarily concluding—contrary to the allegations of the complaint herein and the findings of the ALJ and the D.C. Circuit in *National Assn. of Recycling Industries* v. *F.M.C.*, *supra*—that the type of discriminatory, anticompetitive, destructive rate-fixing involved in this case "is authorized by the FMC-approved [Conference] agreement" (App. 7a). On the contrary, it is prohibited thereby, and wholly beyond the scope of that agreement.[11] Under this Court's decision in *Carnation*, therefore, the complaint should be reinstated because respondents' unapproved rate-fixing activities are unlawful under Section 15 and not exempt from the antitrust laws.

II

The Ninth Circuit's Decision Also Clashes With Other Decisions Of This Court In That It Erroneously Grants Sweeping Antitrust Immunity Under Section 15 Of The Shipping Act To An Unapproved Monopolistic Rate-Fixing Combination Of Carriers And Shippers Which Has Constantly Utilized, As Its Most Effective Anticompetitive Weapon, Secret Preferential Rate-Fixing Agreements That Are Not Subject To Regulatory Control Under The Shipping Act, And Thus Have Likewise Never Been Approved Under Section 15.

In the case at bar, the alleged facts—all of which were established in the prior marathon Shipping Act proceedings—

---

[11] As demonstrated above, the Ninth Circuit's reliance on the Fifth Circuit's decision in *Pacific Westbound Conference* v. *F.M.C.*, *supra*, and *American Export & Isbrandtsen Lines* v. *F.M.C.*, *supra*, was exceedingly misplaced (App. 7a). Its reliance on *Dreisbach* v.

make it clear that here petitioners are *not* seeking to impose unfair antitrust liability on respondents for mere "routine rate-making" activities, wholly within the scope of the Pacific Westbound Conference's organic charter, as the courts in the Ninth Circuit have ruled (App. 4a-7a; 18a-20a). Nor do petitioners merely allege that "wastepaper rates are too high," as the Ninth Circuit inexplicably suggests (App. 2a).

Rather, petitioners charge that here respondent carriers, who monopolize the transportation of 95% to 99% of all wastepaper exports to the Far East, have constantly combined among themselves and with *the wastepaper shippers' competitors*—especially the Japanese cartels that purchase and ship competing wood chips from the West Coast to the Far East—to fix rates for the competing commodities that constantly "outrageously" discriminate against wastepaper shippers and seriously restrain wastepaper exports (App. 33a-37a; Confidential Ex. 99).[*] This alleged rate-fixing combination, and its resulting restraints of trade, are thus similar to those outlawed by this Court under the antitrust laws almost a century ago, soon after the Sherman Act became effective. *Swift and Company* v. *United States*, 196 U.S. 375 (1905); *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897); and *United States* v. *Joint Traffic Assn.*, 171 U.S. 505 (1898).

The record before the Court shows that respondent "Big Six" Japanese carriers have always played an extremely in-

---

Murphy, 658 F.2d 720 (9th Cir. 1981) is similarly misplaced (App. 7a). There, the Court merely reiterated that immunity from the antitrust laws under Section 15 of the Shipping Act depends entirely on whether or not the challenged activities lie within the scope of the FMC-approved agreement involved in each case (658 F.2d 724-729). Here, the challenged rate-fixing is prohibited by the agreement the FMC approved.

[*] See also *Nat. Assn. of Recycling Industries* v. *F.M.C.*, *supra*, at 658 F.2d 822-824.

fluential role in the Pacific Westbound Conference. They constitute 1/3 or more of the Conference's membership, and rates can be fixed at any time by a 2/3s vote of the Conference's members (App. 72a 75a; CR 24, p. 67). Consequently, the Japanese carriers have constantly played an important part in the Conference's monopolistic wastepaper rate-fixing activities. The record demonstrates, however, that while these carriers continuously combined with other carrier members of the Conference's wastepaper transportation monopoly to impose rates on petitioners and other U.S. wastepaper shippers that were outrageously unreasonable and grossly discriminatory when measured against "open" rates concomitantly fixed by Conference members for essentially the same transportation services for competing virgin woodpulp shippers, *all* of the Big Six Japanese carriers were simultaneously combining *outside the Conference* with petitioners' other competitors—the virgin wood chip shippers—to make and perform *secret rate-fixing agreements* which fixed the wood chip shippers' rates for long periods of years at levels 4 times lower than the monopolistic wastepaper rates fixed by respondents through the Conference (App. 33a-37a; 57a-64a; *Confidential Ex. 99*).[13] *None of these secret rate-fixing agreements, fixed in combination by the Japanese carriers and the wood chip shippers, are subject to regulatory control under the Shipping Act, and thus none were ever filed or approved under Section 15.*[14]

As stated above, this powerful rate-fixing combination of carriers and shippers, and its most important weapon, the secret, unapproved wood chip rate-fixing agreements, were extremely effective and extraordinarily anticompetitive. Wood chip exports from the West Coast to the Far East skyrocketed from zero tons in 1965 to more than 4,000,000 tons a year shortly thereafter, while U.S. wastepaper shippers constantly suffered loss of sales, loss of markets and loss of profits (App. 58a; 60a-64a).

---

[13] *Id.*, at 658 F.2d 822-824.

[14] *Id.*, at 658 F.2d 820.

Viewed as a *whole*, as this Court directed in *Swift & Company* v. *United States*, 196 U.S. 375, 394-98 (1905) and *Continental Ore* v. *Union Carbide and Carbon Co.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410 (1962), this monopolistic rate-fixing combination of carriers and shippers plainly is *not* entitled to a sweeping exemption from the antitrust laws simply because the Pacific Westbound Conference's organizational charter was approved 60 years ago under Section 15 of the Shipping Act, as the Ninth Circuit has ruled (App. 4a-7a). Looking at "the economic reality of the relevant transactions" under this Court's decision in *United States* v. *Concentrated Phosphate Export Association*, 393 U.S. 199, 208-210, 89 S.Ct. 361, 366-67 (1968), it immediately becomes clear that the combination's most important anticompetitive weapon—the secret, totally unapproved rate-fixing agreements the Japanese carriers and the Japanese cartels made and performed completely *outside the Conference*, and *totally beyond the scope of the Conference's charter*—have no claim whatsoever to antitrust immunity under either the Conference's charter or Section 15, and thus they, and the *whole* rate-fixing combination which utilized them so forcefully, is *non-exempt*.

This Court has made it plain that "[I]f contracts are not approved by the Commission [under Section 15], the antitrust laws are fully applicable to them." *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 728, 93 S.Ct. 1773, 1776 (1973); *Carnation Co.* v. *Pacific Westbound Conference*, *supra*, at 383 U.S. 216, 86 S.Ct. 784. In *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804, 818 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093, 89 S.Ct. 872 (1969), it was specifically ruled that when so-called tramp divisions of respondent Japanese carriers operate, as they have here, *outside the scope of approved Conference agreements* to fix rates directly with shippers, the antitrust laws are fully applicable when those rate-fixing arrangements, which are *not* subject to regulation under the Shipping Act, result in a restraint of trade.

Similar rulings were made by the Fifth Circuit in *Pacific Westbound Conference* v. *Federal Maritime Commission*, *supra*, at 440 F.2d 1309, 1310, and in the Second Circuit in *Ocean Shipping Antitrust Litigation*, 500 F.Supp. 1235 (S.D. N.Y. 1980).

Moreover, this Court has repeatedly ruled that entities, such as respondent carriers in this case, which might be entitled to a statutory antitrust exemption when they *alone* act lawfully in concert, lose that exemption *when they act in concert with non-exempt parties*, such as the wood chip shippers in this case. *Group Life & Health Ins.* v. *Royal Drug Co.*, 440 U.S. 205, 231-32, 99 S.Ct. 1067, 1083 (1979); *Ramsey* v. *Mine Workers*, 401 U.S. 302, 313, 91 S.Ct. 658, 665 (1971); *Case-Swayne Co.* v. *Sunkist Growers*, 389 U.S. 384, 395-396, 88 S.Ct. 528, 534-35 (1967); *United States* v. *Borden Co.*, 308 U.S. 188, 204-205, 60 S.Ct. 182, 191 (1939).

In this case, therefore, the Pacific Westbound Conference's partial exemption from the antitrust laws under Section 15 of the Shipping Act must be "narrowly construed" and carefully restricted, as this Court ruled in *Group Life & Health Ins.* v. *Royal Drug Co.*, *supra* at 440 U.S. 231, *Abbott Laboratories* v. *Portland Retail Druggists*, 425 U.S. 1, 11-12, 96 S.Ct. 1305, 1313 (1976), and *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, *supra* at 411 U.S. 735—*not* baselessly expanded to *non-Conference* rate-fixing combinations of *carriers and shippers*, as the Ninth Circuit did here. Certiorari is essential so the Ninth Circuit's dangerous, erroneous rulings in this regard may be corrected.

III

The Ninth Circuit's Decision Clashes With Additional Decisions Of This Court—And Concededly It Also Irreconcilably Conflicts With Decisions From Other Circuits—Which Hold That A Regulatory Statute, Enacted To Immunize Lawful, Nondiscriminatory, Private Ratemaking Activities, May Not Be Perverted To Exempt Monopolistic, Discriminatory Rate-Fixing Activities That Violate The Regulatory Statute Itself, Restrain Commerce And Operate Contrary To The Public Interest.

Both the district court and the Ninth Circuit recognized that, while the Pacific Westbound Conference's organic charter was approved under Section 15 of the Shipping Act 60 years ago, all of the monopolistic, discriminatory *rates* challenged by the complaint in this case were thereafter *privately-fixed* by respondents, without any active participation or advance approval of the Federal Maritime Commission or any other federal agency (App. 1a; 13a, 18a).[5] Both courts also realized that before this antitrust action was even commenced, the District of Columbia Circuit ruled that, inescapably, respondents' privately-fixed rates in this case violate Section 18(b)(5) of the Shipping Act, 46 U.S.C. § 817(b)(5); are detrimental to commerce of the United States and contrary to the public interest. *National Association of Recycling Industries, Inc.* v. *Federal Maritime Commission*, *supra*, at 658 F.2d 825 (App. 2a, 3a; 11a).

The two courts nevertheless erroneously cloaked those *unlawful, unreasonable, discriminatory rates* with unlimited immunity from the antitrust laws solely because respondent

---

[5] Section 15 of the Shipping Act provides that, while rate-fixing agreements, understandings and conference charters must be approved in advance by the Commission, tariff rates may be fixed and charged by carriers and conferences "without advance approval" (46 U.S.C. § 814). Both Sections 15 and 18 of the Shipping Act, however, prohibit carriers and conferences from adopting rates *not* "in accordance with law", or which are unreasonable or detrimental to commerce (46 U.S.C. §§ 814, 817(b)(5)).

Pacific Westbound Conference holds the aforesaid approved charter under Section 15 of the Shipping Act (App. 21a; 2a; 70a). Both courts necessarily concede that their *unprecedented* rulings irreconcilably clash with the decision from the Second Circuit in *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 285 F.Supp. 949 (S.D. N.Y. 1968), *cert. denied sub nom. Japan Line, Ltd.* v. *Sabre Shipping Corp.*, 407 F.2d 173 (2d Cir. 1969), *cert. denied* 395 U.S. 922, 89 S.Ct. 1774 (1969) (App. 5a-6a; 15a). The Ninth Circuit also acknowledges the inconsistency of its decision with the recent decision in the District of Columbia Circuit in *United States* v. *Baltimore & Ohio R.R. Co.*, 538 F.Supp. 200, 206-209 (D.C. D.C. 1982), *aff'd sub nom. United States* v. *Bessemer & Lake Erie R.R.*, 717 F.2d 593 (D.C. Cir. 1983) (App. 6a).

This Court has repeatedly ruled in recent years that "even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." *City of Lafayette, La.* v. *La. Power & Light Co.*, 435 U.S. 389, 417, 98 S.Ct. 1123, 1138-39 (1978); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372-375, 93 S.Ct. 1022, 1027-28 (1973); *State of Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 457-462, 65 S.Ct. 716, 726-728 (1945). Here, both Section 18(b)(5) of the Shipping Act and the Conference's own approved charter under Section 15 of the Shipping Act *expressly prohibit* the type of *unreasonable, preferential, discriminatory* rate-fixing activities challenged by the complaint, so in this instance respondents plainly sought "to extend or exploit [their] monopoly in a manner not contemplated" by that approved charter. There is nothing in that charter which "clothes with legality a conspiracy to discriminate." *State of Georgia* v. *Pennsylvania R. Co.*, *supra*, at 324 U.S. 458.

Moreover, Commission approval of the Conference's *facially benign* charter under Section 15 of the Shipping Act could *not* possibly have contemplated that said charter would be utilized repeatedly to violate rate-fixing prohibitions contained in the Shipping Act itself. It would be "a perversion" of Section

15 to hold that it was intended to legalize and approve a rate-fixing combination which constantly violates rate-fixing prohibitions contained in other sections of the same statute. *State of Georgia* v. *Pennsylvania R. Co.*, *supra*, at 324 U.S. 457. On the contrary, Section 15 specifically mandates on its face that the Federal Maritime Commission "shall by order . . . *disapprove, cancel* or *modify*" any conference charter—*including those previously approved*—found to be operating (1) in violation of the Shipping Act, (2) discriminatorily among competing shippers or exporters, (3) detrimentally to U.S. commerce, or (4) contrary to the public interest (See 46 U.S.C. § 814).

Finally, while the Commission, whose "*laxity challenges the very character of the [Shipping] Act*," *National Association of Recycling Industries, Inc.* v. *F.M.C.*, at 658 F.2d 818, has failed effectively to regulate the Pacific Westbound Conference and its members in areas where it does have jurisdiction under the Shipping Act, the Commission simultaneously has *no* jurisdiction (i) to *participate* in the Conference's secret rate-fixing processes, (ii) to *approve* rates fixed by the Conference and its members *before* they are imposed on shippers, or (iii) to *regulate* in any respect the secret rate-fixing agreements the Big Six Japanese carrier members of the Conference have made with petitioners' competitors, the Japanese cartel wood chip shippers. Thus, it was totally erroneous for the Ninth Circuit to rule that the Commission's approval of the Conference's facially benign charter six decades ago somehow operates also to immunize all of respondents' subsequent *unregulated, independent* rate-fixing actions from antitrust scrutiny. This Court has repeatedly ruled that "Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry"; and that "antitrust repeals are especially disfavored where the antitrust implications of a business decision have not been considered by a

governmental entity." *National Gerimedical Hospital & Gerontology* v. *Blue Cross*, 452 U.S. 378, 388-393, 101 S.Ct. 2415, 2421-24 (1981); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106, 100 S.Ct. 937, 943 (1980); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 597-98, 96 S.Ct. 3110, 3121 (1976); *State of Georgia* v. *Pennsylvania R. Co.*, *supra*, at 324 U.S. 458-460; *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030, 1056-57 (9th Cir. 1983), *cert. denied* 104 S.Ct. 156 (1983).

It is hardly surprising, therefore, that the Ninth Circuit's unprecedented decision, which inexplicably fails to follow these basic antitrust concepts, conflicts so irreconcilably with the decisions from the Second Circuit in *Sabre Shipping Corp.*, *supra*, and *Ocean Shipping Antitrust Litigation*, *supra*, and the District of Columbia Circuit's decision in *United States* v. *Bessemer & Lake Erie R. Co.*, *supra*. In *Sabre*, many of the respondents in this case utilized their monopolistic rate-fixing powers under approved conference charters to drive rates so low that Sabre Shipping Corp., a non-Conference competitor in the Pacific eastbound trade, was forced out of business and into bankruptcy. As in the case at bar, the Maritime Commission conducted an investigation under the Shipping Act and roughly 5 years later, an ALJ ruled the unreasonable, discriminatory rates violated Section 18(b)(5) of the Act (285 F.Supp. 949, 953). Sabre thereupon sued under the Sherman and Clayton Acts, but like respondents in this case, the conferences and their carrier members moved to dismiss, contending their rates, *no matter how unlawful under the Shipping Act*, were immunized from antitrust liability by the conference charters which had been approved under Section 15 of the Shipping Act (285 F.Supp. 954, 955). The courts in the Second Circuit denied the motion to dismiss, stating: "The mere fact that agreements setting rates are permitted . . . does not mean that, irrespective of their effect on commerce of the United States, [illegal rates] may be enjoyed until defendants are caught, only to be released from all past liability simply by discontinuing those rates. If this were the law, antitrust limita-

tions on rate agreements, which are price-fixing agreements and per se antitrust violations, would be non-existent and the [defendants] would enjoy an extraordinarily privileged status" (285 F.Supp. 955). Both this Court, and the Second Circuit before it, denied certiorari (407 F.2d 173; 395 U.S. 922); and Sabre's antitrust claim was settled. *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F.Supp. 1339 (S.D.N.Y. 1969).

In *Ocean Shipping Antitrust Litigation, supra*, defendant carriers, which operated under seven approved conference charters in the United States/Europe trade, fixed unreasonable, discriminatory rates pursuant to secret rate-fixing agreements, which, like the Japanese carriers' rate-fixing agreements in this case, had not been approved under Section 15 (500 F.Supp. 1235, 37). The carriers moved to dismiss an antitrust action brought by shippers, contending "the Commission has exclusive jurisdiction over ocean shipping rates so that all rate-fixing activities by ocean carriers have implied immunity from the antitrust laws" (500 F.Supp. 1239). The court in New York relied on this Court's decision in *Carnation Co.* v. *Pacific Westbound Conference, supra*, and flatly denied the carriers' motion (500 F.Supp. 1239-1241). The court stated: "In sum, we find that the implementation of unapproved agreements, including . . . the establishment of rates . . . , is not immune from the antitrust laws" (500 F.Supp. 1241). The shippers' antitrust claims were thereupon settled by the carriers (CR 29, p. 62-66).

Finally, in *United States* v. *Bessemer & Lake Erie R. Co., supra*, rail carriers which operated under a rate-fixing agreement approved by the Interstate Commerce Commission in 1950 under Section 5a of the Interstate Commerce Act, thereafter engaged in anticompetitive, discriminatory rate-fixing activities which were not in conformity with the approved rate agreement. The carriers were thus indicted for criminal violations of the Sherman Act. One of the indicted carriers contended that the approved rate-fixing agreement under the Commerce Act immunized its anticompetitive conduct from

prosecution under the antitrust laws (717 F.2d 595). The District of Columbia Circuit rejected the claim, stating: "[T]he section 5a immunity reaches *only* those actions actually taken 'in conformity with' the rate agreement . . . It does not sweep within it a larger conspiracy which utilizes a Section 5a rate bureau as a means to an end; it does not legitimize *illegal* schemes which happen to coincide at points with the legitimate actions of a rate bureau" (717 F.2d 600).

As stated above, the Ninth Circuit's decision, which conflicts with all of the aforesaid rulings, is truly *unprecedented*. Surely its reliance on *Yellow Forwarding Co.* v. *Atlantic Container Line*, 498 F.Supp. 105 (E.D. Mo. 1980), *aff'd.* 668 F.2d 350 (8th Cir. 1981), *cert. denied* 456 U.S. 962, *Baton Rouge Marine Contractors, Inc.* v. *Cargill, Inc.*, 1976-2 Trade Cases (CCH) ¶ 61,212 (E.D. La. 1976), and *Dreisbach* v. *Murphy*, 658 F.2d 720 (9th Cir. 1981), is gravely misplaced. None of those cases involved monopolistic, discriminatory rate-fixing practices that plainly violated the terms of an approved charter which authorized only reasonable, non-discriminatory rate-fixing. None of those cases involved secret, unapproved, anticompetitive rate-fixing agreements between carriers and shippers that are totally beyond the jurisdiction of the Shipping Act. And, none of those cases involved rate-fixing activities found to violate Section 18(b)(5) of the Shipping Act itself. Indeed, the common thread which runs through all three cases is that they each involve antitrust complaints against routine maritime activities found to be totally within the scope of previously approved agreements under Section 15 of the Shipping Act. See *Yellow Forwarding*, at 668 F.2d 353, 354; *Baton Rouge Marine Contractors*, at page 70, 531; *Driesbach*, at 658 F.2d 727-729. But, as the Louisiana court emphasized in *Baton Rouge*, at page 70, 531: "Of course, the Shipping Act does not shelter illegal conduct clearly beyond the scope of the statute."

Accordingly, certiorari is imperative in this case to set aside and correct the Ninth Circuit's erroneous ruling that even discriminatory, unapproved rate-fixing actions that violate the Shipping Act itself are exempt from the antitrust laws simply

because a conference of carriers holds a facially benign charter under Section 15 of the Shipping Act which licenses only lawful, nondiscriminatory rate-fixing.

IV

Finally, The Ninth Circuit's Decision Also Conflicts With This Court's Decision In *Carnation Co.* v. *Pacific Westbound Conference* By Suggesting That Petitioners Are Foreclosed From Relief Under The Antitrust Laws Because Allegedly Remedies Exist Under The Shipping Act.

The Ninth Circuit's decision implies that petitioners cannot seek relief under the antitrust laws in this case because, in its view at least, "private remedies do exist under the Shipping Act" (App. 7a). However, that same contention was made and flatly rejected by this Court in *Carnation Co.* v. *Pacific Westbound Conference*, *supra*, at 383 U.S. 224. This Court ruled: "Petitioner's failure to seek Shipping Act reparations does not affect its rights under the antitrust laws. The rights which petitioner claims under the antitrust laws are *entirely collateral* to those which petitioner might have sought under the Shipping Act" (383 U.S. 224).

In this case, if petitioners' remedy under the antitrust laws is unfairly taken away, they face the prospect of no remedy at all. First, both the Commission and the Ninth Circuit acknowledge that *no* reparations may be recovered for *past* rate-fixing violations of Section 18(b)(5) of the Shipping Act in response to the D.C. Circuit's rulings in *National Association of Recycling Industries* v. *F.M.C.*, *supra* (CR 34, p. 4, 5; App. 7a). Secondly, the Commission is powerless to award reparations or any other relief under the Shipping Act for the loss of sales and profits petitioners suffered by reason of respondents' secret rate-fixing agreements with shippers *beyond the jurisdiction of the Shipping Act*. Finally, while the Ninth Circuit vaguely suggests that reparations might be recovered for violations of Sections 16 and 17 of the Shipping Act under 46 U.S.C. § 821, the Commission has provided no such remedy after more than 10 years of fruitless investigation under the Shipping Act, and

has not indicated any intention to do so now. Indeed, the Commission has arbitrarily and capriciously stalled and foreclosed all avenues of relief under the Shipping Act in this case, and continues to do so today.

In any event, the complaint in this case "does not seek to have the Court act in the place of the Commission," nor does it "undercut or impair the primary jurisdiction of the Commission over rates." Rather, it seeks "to free the rate-making function of the influences of a conspiracy over which the Commission has no authority, but which . . . can only hinder the Commission in the tasks with which it is confronted." *State of Georgia* v. *Pennsylvania R. Co.*, at 324 U.S. 459, 460; *Ocean Shipping Antitrust Litigation*, *supra*, at 500 F.Supp. 1241-1244.

CONCLUSION

The petition for certiorari should be granted and the erroneous decision of the United States Court of Appeals for the Ninth Circuit should be vacated and set aside. The lower courts erred by summarily dismissing the complaint without affording petitioners a fair opportunity to develop the alleged facts. *Conley* v. *Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957). The monopolistic, discriminatory, anticompetitive rate-fixing activities of respondents in this case are not cloaked with antitrust immunity under the Shipping Act, and they constitute *per se* concerted rate-fixing violations of the Sherman Antitrust Act under this Court's decisions in *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 341-42 (1897), *United States* v. *Joint Traffic Association*, 171 U.S. 505 (1898), *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940), *International Salt Co.* v. *United States*, 332 U.S. 392, 396 (1947), *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958), *Catalano* v. *Target Sales, Inc.*, 446

U.S. 643, 647 (1980), and *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466, 2473-2480 (1982).

Respectfully submitted,

EDWARD L. MERRIGAN
6000 Connecticut Avenue, N.W.
Washington, D.C. 20815
Telephone: 656-0210
Attorney for Petitioners

Of Counsel:

MARSHALL G. MINTZ
REAVIS & MCGRATH
700 South Flower Street
Los Angeles, California 90017

Dated: January ____, 1984